Supreme Court, U.S.
FILED
OCT 14 2003
OFFICE OF THE CLERK

No. 03-392

IN THE

Supreme Court of the United States

GEORGE PATAKI, Governor of the State of New York, *et al.*,

Petitioners,

-v-

THE SARATOGA COUNTY CHAMBER OF COMMERCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

CORNELIUS D. MURRAY*
O'CONNELL AND ARONOWITZ
Attorneys for Respondents Saratoga County Chamber of Commerce, Inc.; Joseph Dalton; New Yorkers for Constitutional Freedoms, Ltd.; Lee Karr; Individually and as Chairman of The Coalition Against Casino Gambling; G. Stanford Bratton, Individually and as Coalition Coordinator for the Western New York Coalition Against Casino Gambling; the Hon. Frank Padavan; and the Hon. William Parment
54 State Street
Albany, N.Y. 12207-2501
(518) 462-5601

* Counsel of Record

Dated: October 9, 2003

(1041 – 2003)

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether an action commenced in state court by a citizen of that state seeking prospective declaratory and injunctive relief against its Governor with respect to his power under that state's Constitution to unilaterally enter into a compact with Native American tribes pursuant to the Federal Indian Gaming Regulatory Act must be dismissed because such tribes' sovereign immunity prevents their joinder as parties to the litigation?

STATEMENT PURSUANT TO RULE 29.6

This brief in opposition is submitted on behalf of the plaintiffs in Action No. 1, whose names are listed on the cover. This action was consolidated with a very similar action (Action No. 2) that had been initiated by a separate group of plaintiffs. *See* Record on Appeal, at A. With respect to the corporate plaintiffs in Action No. 1, both the Saratoga County Chamber of Commerce, Inc., and New Yorkers for Constitutional Freedoms, Ltd., are not-for-profit corporations with no corporate parents, and neither has issued any stock that is owned by any publicly-held company.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

REASONS FOR DENYING THE WRIT 1

I. The Decision by the New York State Court of Appeals Does Not Implicate Any Vested Tribal Rights Nor Compromise Tribal Sovereignty 1

II. The Decision Below by New York State's Highest Court Does Not Raise a Federal Question 3

CONCLUSION 7

TABLE OF CITED AUTHORITIES

Federal Cases

Cheyenne River Sioux Tribe v. South Dakota,
3 F.3d 273 (8th Cir. 1993) 5

New York v. United States,
505 U.S. 144 (1992) 4, 5

Ponca Tribe of Oklahoma v. Oklahoma,
37 F.3d 1422 (10th Cir. 1994),
vacated and remanded in another issue,
517 U.S. 1129 (1996) 5

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 3

Yavapai-Prescott Indian Tribe v. Arizona,
796 F.Supp. 1292 (D. Ariz. 1992) 5

Federal Statutes

25 U.S.C. § 2710(d)(1)(C) 1, 3
25 U.S.C. § 2710(d)(3)(B) 2

State Statutes

N.Y. C.P.L.R. 1001(b) (McKinney 1976) 5

RESPONDENTS' BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I.
The Decision by the New York State Court of Appeals Does Not Implicate Any Vested Tribal Rights Nor Compromise Tribal Sovereignty.

In the decision below, the New York State Court of Appeals ruled that the Governor of that State had violated New York's constitutional separation of powers by unilaterally entering into a compact with the St. Regis Mohawk Indian Tribe without legislative authorization, thereby permitting that Tribe to operate a commercial gambling casino that otherwise would have been prohibited under the Federal Indian Gaming Regulatory Act. 25 U.S.C. § 2710(d)(1)(C). *See* Petition for Writ of Certiorari ("Petition"), at 2a-62a. The Court of Appeals, therefore, upheld the trial court's order enjoining the Governor from entering into any future compacts with *any* Indian tribe absent legislative authorization. *See* Petition at 85a.

The Petition is predicated upon the alleged threat to tribal sovereignty posed by this decision and, in particular, the alleged threat to the continued operation by the St. Regis Mohawks of the gambling casino located at their Akwesasne Reservation in northern New York. *See* Petition at 13 *et seq.* That threat is grossly overstated.

Throughout this litigation, respondents in Action No. 1 have made it abundantly clear that their objective in this case has not been the closure of the existing casino, which petitioners contend would arguably affect vested rights of the St. Regis Mohawks and, indirectly, the Tribe's sovereignty. *See* Record on Appeal at 915. Instead, respondents have consistently sought

to prevent any expansion of gambling pursuant to *future* amendments to the compact with the Tribe which, under the Indian Gaming Regulatory Act ("IGRA"), may not become effective until after they are approved by the U.S. Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B).

This very point was made in two different decisions by the Appellate Division below, which noted that the plaintiffs in Action No. 1 (respondents here) were seeking "prospective relief only." *See* Petition at 98a-99a; *see also* Petition at 68a-69a. The crucial issue, therefore, in this case, is not whether the St. Regis Mohawk Tribe can continue to operate its casino gambling operation under the terms of the Compact that Governor Cuomo had originally entered into with the Tribe. Rather, it is whether the State's Governor, given the separation of powers provisions of the New York Constitution, has the authority to enter into compacts in the future without legislative authorization. That was the crux of the declaratory and injunctive relief the respondents sought when they commenced this action. Indeed, Justice Ginsburg noted the limited nature of the relief respondents sought when she denied the application for a stay pending the filing of a petition for certiorari. *See* Petition at 112a-113a.

Prospective relief was also the critical component of the order of the state trial court judge which was ultimately affirmed by the Court of Appeals enjoining the Governor from expanding the operation to include "electronic gaming compacts with *any* Indian tribe without prior concurrence or approval." (emphasis supplied). *See* Petition at 85a. To summarize, Respondents have not and did not seek to close the St. Regis Mohawk's existing casino operation. There is, therefore, no threat posed to tribal sovereignty by the decision below, since no vested rights were affected. Moreover, respondents' challenge to the 1999 Amendment to the Compact had expired by the time the case

reached the Court of Appeals, and therefore the Court declared that issue moot. *See* Petition at 6a-8a. Since any rights the Tribe may have had under the Amendment had also expired, no tribal rights were in jeopardy. The only remaining relevant part of the decision below was whether, *before* the current or any future Governor entered into any more compacts with Indian tribes, could he/she take such action absent legislative authorization under New York's constitutional separation of powers. This is not a federal question. *See* Point II, *infra*.

II.
The Decision Below by New York State's Highest Court Does Not Raise a Federal Question.

Petitioners are attempting to manufacture a federal question where none exists. To be sure, IGRA is a federal statute, but its implementation requires extensive participation by State governmental officials in the process. While IGRA generally prohibits Indian tribes from engaging in so-called "Class III" gaming, including the operation of sophisticated Las Vegas-style commercial gambling casinos at issue in this case, it allows for an exception provided, *inter alia*, a tribe enters into a compact with the State where such gambling is to occur. 25 U.S.C. § 2710(d)(1)(C). As this Court has noted, however, the duty to negotiate on behalf of a state is one not "likely to be performed by an individual state executive officer, or even a group of officers." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 75, n. 17 (1996). Indeed, Congress, in enacting IGRA, did not presume to tell a state which officials or bodies of the state were to represent the state – nor could it. It is axiomatic that Congress cannot rewrite State Constitutions, or impart to State officials power that they do not possess under their own Constitutions. Congress may not commandeer State officials to

carry out Federal policy. *New York v. United States*, 505 U.S. 144, 176 (1992).

The question of what state officials or bodies can bind a state to a compact under IGRA is, therefore, a quintessential state – rather than federal – law issue that implicates a state's Constitution and its very structure of government. The proposition that state courts are the ultimate arbiters of who, if anyone, can represent a state in compact negotiations with Indian tribes under IGRA is fully accepted by the U.S. Department of Interior, the Federal agency charged with interpreting that statute. *See*, *e.g.*, letter from U.S. Assistant Secretary for Indian Affairs, U.S. Department of the Interior, to Hon. Pete Wilson, Governor of California, dated April 25, 1998. Record on Appeal at 669 (issue concerning the scope of Governor's authority under IGRA is a matter of State law appropriate for ultimate determination by the California judiciary).

Petitioners nevertheless would divest all state courts from ever resolving such a profoundly important constitutional question on the theory that its resolution would necessarily affect the future, contingent interests of Indian tribes that are immune from suit in both state and federal courts and, therefore, cannot be joined as parties. Petitioners further contend that the Tribes are, nevertheless, indispensable parties to any litigation. The inexorable result of such logic is that no court could ever resolve these important state constitutional issues, leaving a judicial vacuum fraught with the potential for mischief and chaos. What if, for example, the next tribe wanting to negotiate a compact with New York under IGRA were to feel frustrated under the Governor and decide instead to enter into a compact with the leaders of the State Legislature, who might be disposed to give the tribe a more favorable "deal"? Then the shoe would be on the proverbial other foot, with the Governor seeking to

challenge the State Legislature's usurpation of his powers. He too, however, would be left without a judicial remedy based upon the very same arguments he has advanced in this litigation.

The doctrine of tribal sovereign immunity was never intended to extend so far that it would deprive a state court of jurisdiction to decide under its own Constitution whether its state officials have the power to enter into compacts with Indian tribes in the future *before* the tribes obtain any vested rights under such Compacts. An Indian tribe's right to gamble is not so essential to its sovereignty that it would prevent a State court from resolving such an important question. It is clear, moreover, that nothing in IGRA requires a State to enter into a Compact with any Indian tribe. *See Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1434 (10th Cir. 1994), *vacated and remanded in another issue*, 517 U.S. 1129 (1996); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993); *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292, 1297 (D. Ariz. 1992); *see also*, *New York v. United States*, 505 U.S. 144 (1992) (Congress cannot force states or state officials to be their instrumentalities to carry out federal policy).

Since respondents do not seek to close the St. Regis Mohawk tribe's existing casino, and since the prospective declaratory and injunctive relief respondents obtained with respect to a Governor's powers to enter into future compacts before any tribes had any vested rights under such Compacts does not implicate tribal sovereignty, there is no federal question posed.

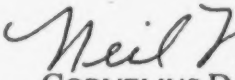
Finally, the New York Court of Appeals applied its State indispensable party jurisprudence pursuant to N.Y. C.P.L.R. 1001(b). Seeking to minimize any conceivable prejudice to the Tribe, it also noted that the St. Regis Mohawks were free to intervene (*see* Petition at 23a), but the Tribe opted not to. The

Court of Appeals ultimately decided that under New York State's indispensable party principles, New York's judiciary should not be deprived of the right to decide a question of profound constitutional significance, implicating its own principles of separations of powers, even though the Tribe was absent from the litigation. Since the prospective relief granted pursuant to its decision does not affect any vested rights of the Tribe, there is no federal question involved. Federal courts do not sit to review a state court's decision on such a fundamentally important question of internal state constitutional law.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition be denied.

Respectfully submitted,



CORNELIUS D. MURRAY
Counsel of Record
O'CONNELL AND ARONOWITZ
54 State Street
Albany, N.Y. 12207-2501
(518) 462-5601
Attorneys for Respondents Saratoga County Chamber of Commerce, Inc.; Joseph Dalton; New Yorkers for Constitutional Freedoms, Ltd.; Lee Karr; Individually and as Chairman of The Coalition Against Casino Gambling;. G. Stanford Bratton, Individually and as Coalition Coordinator for the Western New York Coalition Against Casino Gambling; the Hon. Frank Padavan; and the Hon. William Parment

DATED: October 9, 2003